IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 990 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAMSUDDIN KHUDABAX
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 990 of 1999
Ms. Sadhna Sagar, learned advocate, for the appellant
Mr. K.T. Dave, learned APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.H.KADRI

Date of decision: 01/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated June 25, 1999, rendered by the learned Additional City Sessions Judge, Court No.13, Ahmedabad, in Sessions Case No. 172 of 1996, by which, the appellant is convicted of the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('Act' for short) and sentenced to suffer R.I. for ten years and fine of Rs.1 lakh, in default, R.I. for one year.

2. In the year 1996, Mr. H.K. Chauhan, was discharging duties as Police Inspector, Narcotic Cell, at Ahmedabad. On April 9, 1996, he had received an information that one Samsuddin Khudabax Bhisti, i.e. appellant, residing at Chandola Talav, Chhapra, was dealing in brown sugar. The information received by him was noted in a register and he had conveyed the information to the Deputy Superintendent of Police, Mr. Modi, who was his immediate official superior. PSI, Mr. Chauhan, had arranged to summon two persons who were willing to act as panchas, and, accordingly, Mr. Mahesh Narsinhbhai Parmar and Amrut Mafatlal Parmar were summoned.. As the abovementioned two persons had shown their inclination to act as panch witnesses, PI, Mr. Chauhan, had conveyed the information received by him to them and prepared a preliminary panchanama in his office. Thereafter, he had constituted a raiding party comprising Police Inspector, Mr. N.M. Pathan, Police Inspector,Mr. P.M. Jadav, Head Constable, Mr. N.M. Gosai, Head Constable, Mr. I.G. Purohit, Constable, Mr. Kapadia, etc. and had gone to Chandola Chhapra in a government vehicle. The raiding party had also taken with it material for sealing, twine, scales for weighing substance if found, etc. After reaching the hut occupied by the appellant, PSI, Mr. Chauhan, had called out the name of the appellant and the appellant, who was attired in a safari pant and shirt had come out of the hut. On enquiry being made, the appellant had disclosed his name to be Samsuddin Khudabax Bhisti. The Police Inspector had informed him that an information was received that he was dealing in brown sugar and, therefore, it was necessary to search his house. After conveying the purpose of the visit, the Police Inspector had introduced panch witnesses to the appellant and informed him that it was also necessary to search his person and offered him to be searched in presence of a Magistrate or a Gazetted Officer, but the appellant had declined the offer. It was also offered to the appellant to search the persons of the members of the raiding party, but, the said offer was also declined by the appellant. Thereafter, the hut

of the appellant was searched, but nothing incriminating was found. However, while searching person of the appellant, a match-box of 'kapas' brand was found from one of the pockets of the pant put on by the appellant. On opening the match-box, one small plastic bag was found containing light coloured powder which was emanating a peculiar smell. It was necessary to identify the powder by an on-the-spot analysis and, therefore, Head Constable, Mr. I.G.Purohit, was deputed to call an expert from the Forensic Science Laboratory ('FSL' for short). Head Constable, Mr. Purohit, had secured presence of an expert from the FSL, who, after, on-the-spot analysis had given an opinion in writing that the light coloured powder found from the plastic bag which was kept in 'kapas' brand match-box was brown sugar. The substance found was weighed by Head Constable, Mr. Gosai, and the weight was ascertained to be 4 gram 130 milligram. Thereafter, the plastic bag containing brown sugar was placed in 'kapas' brand match-box which in turn was placed in a tin. The tin was wrapped with a paper and tied by means of twine. Thereafter, a slip bearing signatures of the panch witnesses was affixed on the muddamal and seal bearing inscription "PI NDPS GS C.I.D. CRIME ABAD" was applied thereon. After seizure and sealing of muddamal, second part of panchanama was prepared and the signatures of the panch witnesses were obtained thereon. Police Inspector, Mr. Chauhan, had produced muddamal and the appellant before the Police Station Officer of Maninagar Police Station and lodged a complaint against the appellant. After registration of the complaint, report under Section 157 of the Code of Criminal Procedure was also forwarded to the learned Magistrate having jurisdiction in the matter. The PSO of Maninagar Police Station had handed over the sealed muddamal tin to Crime Writer Head Mr. Andarsinh Patel of Maninagar Police Station for safe custody. Mr. Andarsinh Patel had made necessary entries in the Registrar and kept the muddamal sealed tin in a safe, key of which was retained by him. On April 18, 1996, Crime Writer Head Mr. Andarsinh Patel had handed over muddamal sealed tin to Constable Ramuji Thakore for taking it to the FSL. Unarmed Constable, Ramuji Thakore, had taken muddamal sealed tin to the FSL on April 18, 1996 for analysis. On analysis by the FSL, the substance was identified as brown sugar. The complaint lodged by Mr. Chauhan, was investigated by PSI Mr. Jagatsinh Solanki of Maninagar Police Station. During the course of investigation, the appellant was interrogated and his interrogation revealed that he had obtained brown sugar from Salimbhai Chhipa. Though attempts to apprehend Salimbhai Chhipa were made, but they yielded no result.

However, on July 4, 1996, Salimbhai Chhipa was arrested by Police Inspector, Mr. N.M. Pathan of Narcotic Cell. On conclusion of the investigation, the appellant and Salimbhai Chhipa were chargesheeted before the learned Judge, Special Court, Ahmedabad, of the offence punishable under Section 21 of the Act.

3. Salimbhai Chhipa had submitted an application claiming discharge from the case on the ground that no evidence was collected by the Investigating Officer indicating commission of offence punishable under Section 21 of the Act, by him. Said application was allowed by the learned Judge vide order dated August 27, 1996, and Salimbhai Chhipa was discharged from the case under Section 227 of the Code of Criminal Procedure,1973.

4. The learned Judge had framed charge against the appellant at Exh.5 of the offence punishable under Section 21 of the Act. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried.

5. In order to prove its case against the appellant, the prosecution had examined (i) Mahesh Narsinhbhai Parmar, P.W.1, at Exh.11, (ii) Hashmukhbhai Keshavbhai Chauhan P.W.2, at Exh.13, (iii) Navinpuri Narsinhpuri Gosai, P.W.3, at Exh.27, (iv) Andarsinh Jaysinh Patel, P.W.4, at Exh.29, (v) Jagatsinh Mohansinh Solanki P.W.5, at Exh.32, and (vi) Ramuji Hemtaji Thakore, P.W.6, at Exh.36. The prosecution had also produced documentary evidence, such as panchanama of seizure of contraband item from the possession of the appellant at Exh.12, intimation given by PI, Mr. Chauhan, to his immediate official superior under Section 42(2) of the Act at Exh.16, the resolution passed by PI, Mr. Chauhan, before searching the house of the appellant at Exh.17, memo indicating arrest of the appellant at Exh.19, seizure memo at Exh.20, complaint lodged by PI, Mr. Chauhan, at Exh.21, entry indicating that the muddamal was handed over to Constable Ramuji Hemtaji at Exh.29, report of the FSL at Exh.34, etc. in support of its case against the appellant.

6. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the case of the appellant was that one Babubhai, who was dealing in brown sugar at Kheda was desirous of marrying

his daughter, but,as he had declined the said offer, a false case was made out against him, but, he was innocent. It may be stated that the appellant had not examined any witness to substantiate his abovementioned defence.

7. On appreciation of evidence adduced by the prosecution and after hearing the learned advocates of the parties, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on April 9, 1996, the appellant was found in possession of brown sugar weighing 4 gram 130 milligram illegally and that he had committed offence punishable under Section 21 of the Act. In view of the abovereferred to conclusions, the learned Judge has convicted the appellant of the offence punishable under Section 21 of the Act and imposed sentence referred to earlier by judgment dated June 25, 1999, giving rise to instant appeal.

8. It may be mentioned that the appellant had by application dated September 6/7, 1999, prayed to make free legal aid available to him on the ground that he was poor and was not able to engage a lawyer of his choice. Accordingly, Mr. P.K.Soni, learned advocate practising in the High Court, was appointed to render free legal aid to the appellant. Mr. P.K.Soni, learned advocate, has handed over the brief to Ms. Sadhna Sagar, learned advocate practising in the High Court, for arguing the appeal on behalf of the appellant and, accordingly, Ms. Sadhna Sagar, has addressed the Court at length. Under the circumstances, the appointment of Mr. P.K. Soni, learned advocate, which was made to render free legal aid to the appellant, is hereby cancelled and Ms. Sadhna Sagar, learned advocate, is appointed to render free legal assistance to the appellant.

9. Ms. Sadhna Sagar, learned advocate of the appellant, contended that the muddamal tin was found to be bearing the seal of "PI NDPS GS CID CRIME ABAD", whereas the evidence of PI, Mr. Chauhan, establishes that seal of "PI NDPS GS CID CRIME AHMEDABAD", was applied and, as there is discrepancy in the evidence regarding the seal applied on the muddamal tin, it should be held that the muddamal tin was not properly sealed and reasonable benefit of doubt to which the appellant is entitled, should be given to him. What was maintained was that no explanation worth the name is offered by the prosecution as to why muddamal sealed tin, which was handed over to Crime Writer head, Andarsinh Patel, on April 10, 1996 for safe custody, was despatched to the FSL on April 18, 1996 and, in view of paucity of

evidence, this Court should come to the conclusion that the muddamal tin was not kept safely so as to rule out possibility of tampering with or substitution of the substance allegedly found from possession of the appellant. The learned advocate of the appellant pleaded that the provisions of Section 42(2) and Section 50 of the Act were not complied with and, therefore, the appeal should be accepted. According to the learned advocate of the appellant, the evidence adduced by the prosecution has not been appreciated in the right perspective by the learned Judge and, therefore, the conviction of the appellant should be set aside by allowing the appeal.

10. Mr.K.T.Dave, learned Additional Public Prosecution, pleaded that the seal applied on the muddamal tin is correctly described by witness, Navinpuri Narsinhpuri Gosai, who had applied the same on the muddamal tin and as seal described and applied by witness, Navinpuri Narsinhpuri Gosai, clearly matches with the particulars of the seal mentioned in the report of the FSL, the plea raised regarding possibility of substitution of and/or tampering with the muddamal substance should not be accepted by the Court. It was argued that the seal applied was in English language whereas it was sought to be described by the Police Inspector in Gujarati language at the time of recording of his testimony before the Court, but minor discrepancy in describing the seal would not establish that there was possibility of tampering with and/or substitution of substance found from the possession of the appellant. It was argued that the evidence of witness, Navinpuri Narsinhpuri Gosai, read with that of Head Constable, Ramuji Hemtaji Thakore, indicates that the sealed muddamal tin was kept in safe custody at the police station, whereas the report of the FSL shows that the muddamal was received intact, which, in turn, rules out possibility of tampering with and/or substitution of substance found from the possession of the appellant and, therefore, no benefit of doubt should be given to the appellant on the basis that there was possibility of tampering with and/or substitution of substance. After referring to the evidence of PI, Mr. Chauhan and that of panch witness, Maheshbhai Parmar, it was contended that their evidence establishes that the provisions of Section 42(2) and Section 50 of the Act were complied with and, therefore, it is not correct to argue that those provisions were not complied with by the prosecution. According to the learned counsel of the State Government, cogent and convincing reasons have been assigned by the learned Judge for convicting the appellant of the offence

punishable under Section 21 of the Act and, as the learned advocate of the appellant has failed to dislodge those reasons, the appeal should be rejected.

11. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The plea that seal of "PI NDPS CID CRIME GS ABAD" was not applied, but seal of "PI NDPS CID CRIME GS AHMEDABAD" was applied, which either indicates that the muddamal found from the possession of the appellant was not sent to the FSL for analysis or does not rule out possibility of tampering with and/or substitution of substance found from the possession of the appellant and, therefore, benefit of doubt should be accorded to the appellant, is devoid of merit. The evidence on record clinchingly establishes that, after keeping the match-box inside a tin, the tin was sealed by first grade Jamadar Navinpuri Narsinhpuri Gosai. This witness, in his substantive evidence before the Court, recorded at Exh.27, has in terms asserted that, after affixing the slip containing signatures of panch witnesses, seal of "PI NDPS GS CID CRIME ABAD" which was in English language, was applied on the slip. It is relevant to notice that this very seal was found by the FSL when muddamal sealed tin was received by it on April 18, 1996. The report of the FSL is produced on the record of the case at Exh.34. However, Exh.34 containing true and full particulars does not form part of the paper book of instant appeal. Therefore, this Court has perused the original record including Exh.34, which indicates that, while forwarding muddamal sealed tin to the FSL on April 18, 1996, specimen seal of "PI NDPS GS CID CRIME ABAD" was also forwarded separately to the FSL, and the seal found on the muddamal tin was found to be the same as mentioned in the specimen seal which was forwarded separately. It is true that PI, Mr. Chauhan, has stated in his testimony before the Court that seal of "PI NDPS GS CID CRIME AHMEDABAD" was applied on the slip bearing signatures of the panch witnesses which was affixed on the tin. However, there is no manner of doubt that seal of "PI NDPS GS CID CRIME ABAD" was in English language and, therefore, while describing the seal, some inaccuracy has crept in, in the evidence of PI, Mr. Chauhan. The fact that the seal applied was in English language, is also evident if one refers to the contents of the panchanama of the contraband item produced at Exh.12. In the panchanama, it is specifically mentioned that seal of "PI NDPS GS CID CRIME AHMEDABAD", which was in English language, was applied on the slip bearing signatures of the panch witnesses. It is relevant to

notice that the expression 'ABAD' is short form of word 'AHMEDABAD' and what is done by P.I. Mr. Chauhan while describing the seal is that he has described 'ABAD' as 'AHMEDABAD'. This minor discrepancy in describing particulars of seal is inconsequential and does not go to show that the offending substance which was found from the possession of the appellant was not sent to the FSL or that some other substance bearing a different seal was sent to the FSL for analysis or there was a possibility of tampering with and/or substitution of substance found from the possession of the appellant. The report of the FSL in a case arising under the provisions of the Act becomes relevant in order to know whether the offending substance is a narcotic drug or psychotropic substance within the meaning of the Act. The evidence on record beyond pale of doubt establishes that PI, Mr. Chauhan, had deputed Head Constable, Mr. I.G. Purohit, to secure services of an expert from the FSL for, on-the-spot analysis of the substance found from the possession of the appellant. Accordingly, services of an expert from the FSL were requisitioned. Exh.18, which is a report issued by an expert of the FSL, indicates that, on-the-spot analysis of the substance found from the possession of the appellant had revealed that the substance found was "brown sugar". Thus, there is no manner of doubt that cogent, reliable and convincing evidence has been adduced by the prosecution to establish that what was found from the possession of the appellant on April 9, 1996 was brown sugar. Further, evidence of Crime Writer Head, Andarsinh Patel, recorded at Exh.29, proves that PSO, Mr. Karsanbhai Jaisinhbhai of Maninagar Police Station, had handed over sealed muddamal tin to him for safe custody and that he had kept sealed muddamal tin in a safe and retained keys of the same with him. His evidence would further show that he had handed over sealed muddamal tin to constable Ramuji Hemtaji Thakore on April 18, 1996 for carrying the same to the FSL. Evidence of Ramuji Hemtaji Thakore recorded at Exh.36, establishes that he was handed over sealed muddamal tin by Crime Writer Head, Andarsinh Patel, on April 18, 1996 for carrying the same to the FSL and that, accordingly, he had carried the same to the FSL on April 18, 1996. If the evidence of Crime Writer Head, Andarsinh Patel, and the evidence of Ramuji Hemtaji Thakore, is read with the contents of the report of the FSL, the chain becomes complete and the farfetched possibility of tampering with and/or substitution of substance found from the possession of the appellant at once becomes illusory. The discrepancy in describing the seal applied on the muddamal does not show that there was possibility of tampering with and/or substitution of substance found

from the possession of the appellant and, therefore, the first contention, which has no merit, is hereby rejected.

12. Plea that the provisions of Section 42(2) of the Act were not complied with and, therefore, the appeal should be accepted, has no substance. PI, Mr. Chauhan, in his substantive evidence before the Court, in terms, has stated that he had received an information that the appellant was dealing in brown sugar and, after receiving the information, he had made necessary entry in the information register maintained in the office of Narcotic Cell. He has further stated that he had conveyed the information received by him to the Deputy Superintendent of Police, Mr. Modi, who was his immediate official superior. In order to substantiate his say, PI, Mr. Chauhan, had produced certified xerox copy of the register at Exh.15 and the letter conveying information received by him to his immediate official superior, at Exh.16. Exh.16 clearly establishes that the provisions of Section 42(2) of the Act were complied with by Mr. Chauhan. It is wrong to contend that the provisions of Section 42(2) of the Act were not complied with and, therefore, the impugned judgment should be set aside.

13. The plea that there is breach of provisions of Section 50 of the Act has no factual basis. The evidence of P.I. Mr. Chauhan, shows that he had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, but, the appellant had declined the said offer. The evidence of P.I. Mr. Chauhan, gets full corroboration from the contents of panchanama, which is duly proved through testimony of panch witness, Maheshbhai Parmar, recorded at Exh.11. In Exh.12, it is specifically recited that P.I. Mr. Chauhan, had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, but the appellant had declined the said offer. Further, the evidence of first grade jamadar, Mr. Navinpuri Narsinhpuri Gosai, recorded at Exh.27, establishes that he was one of the members of the raiding party and that, in his presence, P.I. Mr. Chauhan, had offered the appellant to be searched in presence of a Magistrate or any other Gazetted Officer, but the appellant had declined to be searched in presence of a Magistrate or a Gazetted Officer. Though this witness has been searchingly cross examined by the defence, the assertion made by him that P.I. Mr. Chauhan, had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer, and that the appellant had declined the said offer, is not demonstrated to be untrue or false. Therefore, there is

no manner of doubt that the provisions of Section 50 of the Act were complied with by PI, Mr. Chauhan, before effecting search of person of the appellant. The learned Judge of the trial court has considered the question whether the provisions of Section 50 of the Act were complied with or not, and recorded a finding that the provisions of Section 50 of the Act were complied with by the prosecution. The learned advocate of the appellant has failed to dislodge the reasons recorded by the learned Judge while coming to the conclusion that the provisions of Section 50 of the Act were complied with by PI. Mr. Chauhan. The net result of the above discussion is that the provisions of Section 50 of the Act were complied with by the prosecution and the appellant is not entitled to any benefit on the ground that the mandatory provisions of Section 50 of the Act were not complied with by PI. Mr. Chauhan before effecting search of person of the appellant.

14. Except contentions referred to above, which have been dealt with by this Court, no other contention has been raised by the learned advocate of the appellant for consideration of this Court in support of instant appeal. After analysing, sifting and assessing evidence on record with particular reference to its trustworthiness and truthfulness by a process of dispassionate judicial scrutiny, this Court finds that the conviction of the appellant for offence punishable under Section 21 of the Act is well founded and no ground is made out by the learned advocate of the appellant to interfere with in instant appeal. The appeal, therefore, fails and is dismissed. The muddmal be disposed of in terms of directions given by the learned Additional City Sessions Judge in the judgment impugned in the appeal.

(J.M. Panchal, J.)

(M.H. Kadri, J.)

(swamy)